REPORTABLE

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **LPA NO. 1080 OF 2006**

% **Date of Decision** : 1st October, 2007.

MR. GATAKALA VENKATESWARLU .... Appellant.
Through Mr. Upmanyu Hazarika, Advocate.

VERSUS

UOI & ANR. .... Respondents.
Through Mr. Mukesh Anand, Mr.S. Tiwari and
Ms. Zeba Tarannum Khan, Advocates

CORAM:

HON'BLE DR. JUSTICE MUKUNDAKAM SHARMA, CHIEF JUSTICE
HON'BLE MR. JUSTICE SANJIV KHANNA

1. Whether Reporters of local papers may be allowed to see the judgment?

2. To be referred to the Reporter or not ?

3. Whether the judgment should be reported in the Digest ?

SANJIV KHANNA, J:

1. The appellant, Mr. Gatakala Venkateswarlu is an Indian citizen. He

was working and living in Kuwait in August, 1990 when gulf war broke out with Iraq occupying Kuwait. Leaving behind his personal belongings and worldly goods to save his life and the lives of his family members, the appellant left Kuwait via Baghdad and Jordan to reach India.

2. The appellant saw a ray of hope when United Nations Compensation Commission (hereinafter referred to as UNCC, for short) floated a Scheme for payment of compensation to persons who had lost and suffered during the Gulf War. Claims were invited under four heads : Claim 'A' : ex gratia payment of US$ 2,500 for individuals who had fled Kuwait; Claim 'B' : claim for injury or death; Claim 'C' : for losses caused to person and property upto US$ 100,000; Claim 'D' : for losses to property above US$ 100,000. Claimants were required to submit applications to their National Governments who would forward the same to UNCC. Claimants could not directly approach UNCC with their claims and per force were required to make applications with the National Governments in terms of the scheme.

3. On 28th October, 1992, the appellant made applications for claims in forms 'A' and 'C' with the Embassy of India in Kuwait, the designated authority

of the Union of India. His claim was registered at AT-302 and a receipt was issued by the authorised officer, Embassy of India in Kuwait. The said receipt is on record and clearly shows that compensation claim forms 'A' and 'C' had been received from the appellant.

4. As noted above, under claim 'A' standard compensation of US$2,500 was payable to the claimants and under claim 'C' damages and losses of personal effects, property and income upto US $ 100,000 was payable.

5. There is no dispute between the appellant and the Union of India in respect of claim 'A' as the said claim stands paid. It is an admitted case of the parties that claim 'C' was not forwarded to UNCC and has not been paid to the appellant. This had forced the appellant to approach this Court by filing Writ Petition (Civil) No. 4645/2001 which stands dismissed by the impugned judgment dated 10th February, 2006 leading to filing of the present Appeal.

6. The claim of the appellant is that as there was lapse and negligence on the part of Union of India in not forwaring claim no.'C' to UNCC and therefore the appellant was not paid claim No.C. Thus, the Union of india

must recompensate him and pay him claim No.C.

7. The defense of the respondents-Union of India is multifarious. We will deal with them in seritum.

8. Firstly, it was contended on behalf of Union of India that the relevant records are not traceable and therefore they cannot admit or deny that the appellant had submitted claim form 'C' seeking compensation of KD 23,495. At the same time, it is not denied that the acknowledgment receipt issued by the Embassy of India in Kuwait specially states that claim in form no. 'C' was received. It is stated that the receipt issued by Embassy of India does not bear any date. The above contention of the respondents is liable to be rejected. The receipt issued by the Embassy of India in Kuwait bears the date 28th October, 1992 clearly and also bears Srl. No. AT-302 (Annexure P-3 of the paper book). The receipt is signed and it is specifically stated that compensation claim forms 'A' and 'C' have been received. Form 'A' and 'C' have been ticked and marked in positive and the other columns have been scored of. There is no specific denial of the avements made in the writ petition that claim form No.C for compensation of KD 23,495 was filed and

receipt was issued in token thereof. The averments to this extent in the writ petition are deemed to be admitted by the respondent-Union of India. If the Embassy of India in Kuwait had failed to forward claim form No. C or it was misplaced, the same is an internal matter between the relevant Ministry in the Government of India and the Embassy of India in Kuwait. The appellant cannot be blamed nor can he be made to suffer for the said lapse. It is not the case of the respondents that the Embassy of India in Kuwait was not authorised to receive the forms and issue acknowledgment receipts.

9. The next contention raised by the respondents-Union of India is that the appellant does not have any claim against the respondents as no compensation was payable by the Union of India. Compensation as per the Scheme to the victims of the Gulf war was payable by UNCC and not by the Union of India. Union of India is not therefore liable. We do not find any merit in the said contention. The appellant was not claiming compensation from the Union of India, when he filed form 'C'. As per the procedure prescribed by UNCC and accepted by the Union of India, all claims had to be made to the prescribed authority appointed by the Union of India for being forwarded to

UNCC. Embassy of India at Kuwait was the prescribed authority appointed by the Union of India. The appellant has been forced to file a writ petition because the Union of India did not forward his claim to UNCC and not because he is seeking compensation under any scheme floated by the Union of India to compensate victims of the Gulf war. It is not the case of the respondent that claim of the appellant was rejected on meirts by UNCC. In fact it is an admitted case that the claim form 'C' filed by the appellant was not forwarded to UNCC by the Union of India. The cause of action for filing of the writ petition is the failure of the Union of India to forward the claim to UNCC. Rejection of the claim by UNCC is not subject matter of the writ petition or this Appeal. In fact the claim form 'C' was never forwarded to UNCC and therefore the appellant submits that cause of action has arisen in his favour and against the respondent.

10. The next question which arises for our consideration is whether the respondents-Union of India is guilty of negligence because of failure to forward the claim form 'C' to UNCC? In the counter affidavit it was submitted that over 1.45 lakhs compensation applications were received and in the

wake of handling of such vast volume of paper, loss of claim form 'C' by the appellant cannot be treated as negligence. It was further stated that the appellant again applied in claim form 'C' in October, 1995, well after the prescribed date fixed by UNCC and therefore no relief could be granted to the appellant. Another contention raised was that the writ petition was not maintainable.

11. For the sake of convenience these contentions are being dealt with together. The contentions of the respondents-Union of India are reiteration of the maxim : "*the State can do no wrong"* and "*State is not answerable for the torts committed by its servants"*. The two maxims have been gradually diluted over a period of time and the immunity granted to the State has ebbed and eroded. In Public Law field, courts have repeatedly intervened to enforce public duties by authorities. A citizen has right to invoke jurisdiction of High Court under Article 226 of the Constitution of India for enforcement of his Fundamental Rights and for any other purposes, which would also include enforcement of public duties by the Government. Any action of the Government or public bodies which is arbitrary, violates Article 14 and 21 of

the Constitution of India or contrary to statutory and legal rights can be challenged. In ***Common Cause, a Registered Society versus Union of India*** reported in (1999) 6 SCC 667, the Supreme Court noticed the ever-expanding operation/dimension of Public Law field, which in some cases includes contractual matters. Public Law remedies have been extended by the Supreme Court in the realm of Tort. Compensation has been awarded to persons who have suffered at the hands of the officers of the Government for injuries on account of tortious acts. Courts have intervened where there is violation of Fundamental Rights, there is lack of enforcement or failure to enforce public duties.

12. A Writ Petition is maintainable if an authority fails to perform public or governmental functions. Failure to perform public duty is amenable to writ jurisdiction. Public duty need not be imposed by a statute. Public character of the duty is sufficient. Rights, Duties and privilges of public authorities and their relationship with individual citizens of the state pertains to public law, in contradiction to private law fields – which are those branches of law which deal with the rights and liabilities of private individuals in relation to one

another (Refer LIC of India versus Escorts (1986) 1 SCC 264).

13. The Supreme Court in the case of ***State of U.P. versus Joharimal*** reported in (2004) 4 SCC 714 has held that legal right of an individual may be founded on a contract, a statute or an instrument having the force of law. Actions of any authority be it legislature, executive, instrumentality or person/authority imbued with public law element, can be made subject matter of a writ petition under Article 226 of the Constitution. To decide whether the question raised relates to public law remedy or public law field, each case has to be determined having regard to the nature of and extent of an authority vested in the State. Power to entertain a petition under Article 226 of the Constitution, within the scope of judicial review, is decided by answering the question : whether a particular decision under challenge is justiciable. However, even when a petition is maintainable, power of judicial review by the courts is restricted ordinarily to illegality, irrationality or impropriety. It is not intended to review the governance as an appellate forum and act as *suprema lex*.

14. In ***ABL International Ltd and another versus Export Credit***

Guarantee Corporation of India and others reported in (2004) 3 SCC 553, the appellant therein had taken insurance cover in respect of the export contracts from Export Credit Guarantee Corporation of India. The Court examined several decisions including ***VST Industries versus Workers Union*** reported in (2001) 1 SCC 298 wherein it has been observed as under:-

> " In *Anadi Mukta* , *case* this Court examined the various aspects and the distinction between an authority and a person and after analysis of the decisions referred in that regard came to the conclusion that it is only in the circumstances when the authority or the person performs a public function or discharges a public duty that Article 226 of the Constitution can be invoked. In the present case, the appellant is engaged in the manufacture and sale of cigarettes. Manufacture and sale of cigarettes will not involve any public function."

15. It was noted that the question whether an authority is discharging public function or public duty can be answered with reference to the ratio in the case of ***Kumari Shrilekha Vidyarthi versus State of U.P.*** reported in (1991) 1 SCC 212 by answering whether the State action is really in the nature of its personality as a State, which is significant. It does not matter

what is the nature of function. The Court while examining public duties or the function test discerns the State action on the touchstone of Article 14 i.e. public duty to act fairly, justly and reasonably. While examining the question whether a writ court can issue mandamus for refund of money, the Supreme Court held that the power exists but the said power is to be exercised sparingly depending on the facts and circumstances of each case. It was accordingly observed that a writ petition involving consequential relief of monetary claim is maintainable. The Supreme Court reiterated that the State while exercising its powers and discharging its functions must act indisputably for public good and in public interest. It cannot act unfairly and unreasonably in violation of Article 14 of the Constitution.

16. We may also refer here to an earlier judgment of the Supreme Court in the case of ***Jaylakshmi Salt Works (Pvt.) Ltd. Versus State of Gujarat*** reported in (1994) 4 SCC 1. In the said case after heavy downpour a reclamation bundh collapsed leading to flooding of the claimants factory who then made a claim for compensation. The Trial Court dismissed the suit on

the ground that negligence was not proved and the damage was caused due to Act of God. The High Court also dismissed the appeal after split verdict, on the ground that Rule of Strict Liability as enunciated in ***Rylands versus Fletcher*** reported in (1868) 3 HL 330 is not applicable and stands modified by the judgment of the Supreme Court in the case of ***State of Punjab versus Modern Cultivators*** reported in AIR 1965 SC 17. The Supreme Court allowed the appeal holding, inter alia, that between cases of strict liability and fault liability, there can be numerous cases which may entitle a citizen to sue Government for damages, if losses are occasioned by failure to perform duty, general or specific, by the Government which may arise due to negligence or even inevitable mistake. We take benefit of quoting some paragraphs from the said judgment, which read as follows:-

> **"8**.....Truly speaking entire law of torts is founded and structured on morality that no one has a right to injure or harm others intentionally or even innocently. Therefore, it would be primitive to class strictly or close finality (*sic* finally) the ever-expanding and growing horizon of tortious liability. Even for social development, orderly growth of the society and cultural refineness, the liberal approach to tortious liability by courts is more conducive.
>
> **9.....**In a welfare society construction of dam or

bundh for the sake of community is essential function and use of land or accumulation of water for the benefit of society cannot be non-natural user. But that cannot absolve the State from its duty of being responsible to its citizens for such violations as are actionable and result in damage, loss or injury..... Once the occasion for loss or damage is failure of duty, general or specific, the cause of action under tort arises. It may be due to negligence, nuisance, trespass, inevitable mistake etc. It may be even otherwise. In a developed or developing society the concept of duty keeps on changing and may extend to even such matters as was highlighted in *Donoghue* v. *Stevenson* (1932 All ER Rep 1) where a manufacturer was held responsible for injury to a consumer. They may individually or even collectively give rise to tortious liability. Since the appellant suffered loss on facts found due to action of respondents officers both at the stage of construction and failure to take steps even at the last moment it was liable to be compensated.

10. But to be actionable and get redress from court it must assume legal shape by falling in one or the other statutorily, judicially or even otherwise recognised category of wrong. That is why the appellant based his claim on negligence..... Winfield has defined 'negligence' as under:

" 'Negligence' as a tort is the breach of a legal duty to take care which results the State or an individual. For this submission advanced with plausibility it appears necessary to determine how wide or narrow is the ambit of negligence in realm of torts. Can it be strictly compartmentalised? When the State was found reluctant in discharge of its duties or public responsibility then was it negligence alone or it was something more or less?

11. 'Negligence' ordinarily means failure to do statutory duty or otherwise giving rise to in damage, undesired by the defendant, to the plaintiff. Thus its ingredients are -

(*a*) a legal duty on the part of A towards B to exercise care in such conduct of A as falls within the scope of the duty;
(*b*) breach of that duty;
(*c*) consequential damage to B."

According to Dias,

"[L]iability in negligence is technically described as arising out of damage caused by the breach of a duty to take care."

These textbooks thus make it amply clear that the axis around which the law of negligence revolves is duty, duty to take care, duty to take reasonable care. But concept of duty, its reasonableness, the standard of care required cannot be put in strait-jacket. It cannot be rigidly fixed. The right of yesterday is duty of today. The more advanced the society becomes the more sensitive it grows to violation of duties by private or even public functionaries. Law of torts and particularly the branch of negligence is consistently influenced and transformed by social, economic and political development..... Yet the law was expanded to achieve the objective of protecting the common man not by narrowing the horizon of legal injury but by widening it. In *Donoghue* v. *Stevenson* (supra) the House of Lords held a duty to take care as a specific tort in itself. Even improper exercise of power by the authorities giving rise to damage has been judicially developed and distinction has been drawn between power coupled with duty. Where there is duty the exercise may not be proper if what is done was not authorised or not

> done in the bona fide interest of the public. In *David Geddis* v. *Proprietors of the Bann Reservoir* ((1878) 3 as 430) the failure to keep the reservoir clean as a result of blameworthy negligence leading to overflow was held to be liable for negligence. It was reiterated in *Tate and Lyle Industries Ltd.* v. *Greater London Council* ((1983) 1 All ER 1159). It was held that where public right was interfered with which resulted in public nuisance the claim for damages was maintainable."

17. The contention that large number of compensation applications were received and therefore loss and failure to sent the claim application of the appellant to UNCC does not constitute negligence cannot be accepted. Negligence is failure to take reasonable care as required in the facts and circumstances. It is omission to do something which was required and should have been done by a reasonable person. The respondent, owed a duty to take care that the applications for compensation that were received were forwarded to UNCC. The respondents were also aware of the consequences and the effect and failure to properly maintain records and to deal with the applications for compensation and also to forward them. Causal connection is therefore established. In case applications were not forwarded to UNCC, the claimants would not have received compensation. In such circumstances it

was the responsibility and public duty of the Union of India to ensure that the applications received were properly attended to and forwarded to UNCC. In case substantial number of applications had been received, a greater care and caution was required to be exercised. Failure and consequence of not exercising care and caution was well known to the respondents. The respondents were aware and conscious of natural and inevitable result in case any application was misplaced and not forwarded to the UNCC. A person with modest measure of prevision would have realised that loss or misplacement of the forms was a real possibility and likehood of injury was apparent and obvious. If consequences can be forseen, duty to take care arises. Thus, the contention of the respondents that it was not negligent cannot be accepted. We have already quoted above definition of the term *negligence* as interpreted by the Supreme Court in ***Jaylakshmi Salt Works Pvt. Ltd. (supra).***

18. We may refer here to the judgment of the Supreme Court in the case of ***M.S. Grewal and another versus Deep Chand Sood and another*** reported in (2001) 8 SCC 151. The said case relates to death of five school

students who had gone for a picnic and got drowned. The Supreme Court relied upon an earlier judgment in ***Lata Wadhwa versus State of Bihar*** reported in (2001) 8 SCC 197 and held that failure to exercise due care expected of a reasonable prudent person would constitute negligence. Shameful disregard of safety and interest of others, constitutes breach of duty and can be made subject matter of a claim under the Law of Torts. Lack of proper care, want of attention which a prudent and reasonable man would have taken in the circumstances shall constitute negligence. The Supreme Court quoted with approval the following statements made in ***Clerk and Lindsell on Torts,*** which are extracted below:-

> *"**14**.....Clerk and Lindsell on Torts* (18th Edn.) sets out four several requirements of the tort of negligence and the same read as below:
>
> (*1*) The existence in law of a duty of care situation i.e. one in which the law attaches liability to carelessness. There has to be recognition by law that the careless infliction of the kind of damage in suit on the class of person to which the claimant belongs by the class of person to which the defendant belongs is actionable.
>
> (*2*) Breach of the duty of care by the defendant i.e. that it failed to measure up to the standard set by law.

> (*3*) A causal connection between the defendants careless conduct and the damage.
>
> (*4*) That the particular kind of damage to the particular claimant is not so unforeseeable as to be too remote."

19. In the said case, the Supreme Court also pointed out that the current trend of justice oriented approach should not be thwarted on technicalities and the object and purpose should be to give and do justice.

20. The appellant had legitimate expectation that the respondent shall forward his application to UNCC. Citizens have right to be treated fairly and can legitimately expect that the Government will perform its duties and responsibilities. This promise by the authorities in its public dealings is implied and accepted under our Constitutional framework and is the essence of the "government for the people". The expectation of a citizen in this regard is a legitimate and a valuable right.

21. Lastly, it was contended before us by the respondents that the appellant is guilty of contributory negligence. It was stated that the appellant had received acknowledgment card in respect of the claim form 'A' but not in

respect of claim form 'C'. The contents of the acknowledgement card relied upon read as under:-

> "Dear Sir\Madam,
>
> Your compensation claim, details of which are given overleaf, has been registered and forwarded to the United Nations Compensation Commission, Geneva for further action. If you have applied under any other category also, seprate acknowledgment wil be sent in due course.
>
> Discrepancy, if any, in the details of the claim should be brought to our notice immediately. Please quote the registration number given overleaf for all further correspondence.
>
> SPECIAL KUWAIT CELL"

22. To examine the above contention, facts may be noticed. On 28th October, 1992 the appellant filed two claim forms with the Embassy of India in Kuwait. The same had to be forwarded by the Union of India to UNCC for payment of compensation. UNCC had fixed a cut-off date by which claim forms had to be received. The cut-off dates were extended from time to time and the last cut off date so fixed was 1st January, 1995. The appellant had made application with the Embassy of India in Kuwait on 28th October, 1992, i.e. before the cut-off date. UNCC could receive applications after the cut-off date only if the following condition were satisfied : "bureaucratic delay, postal

delay or breakdown of civil order and beyond the control of the claimant".

23. Claim form 'A' of the appellant was forwarded by the respondents to UNCC and after the said claim was registered an acknowledgement card mentioned above was issued. Case of Union of India is that the appellant did not take appropriate action, even after acknowledgement card in respect of claim 'C' was not received . We may here refer to the letter dated 10th May, 1996 written by the respondents which reads as under:-

> "An Acknowledgement Card will be issued in respect of the late claim only if we receive an indication from the UNCC that they have taken up the claim for examination.
>
> It is clarified that it is the exclusive responsibility of the UNCC to evaluate and scrutinise the claims, evolve a payment procedure and deliver the awarded compensation to eligible claimants for payment through national governments. It is not possible to estimate the time or the value of the payment which may eventually be made by the UNCC."

24. Thus acknowlgement card was issued by the respondent-Union of India after the claim was registered by UNCC. The appellant has stated that the acknowledgement card in respect of the claim 'A' was received by him in March, 1995 i.e. after the cut-off date for submission of claims i.e. 1st January,

1995. The respondents have not filed any document or material to show that the acknowledgement card in respect of claim 'A' was sent to the appellant before 1st January, 1995. Moreover, the acknowledgment card clearly stated that if a claim was registered under any other category a separate acknowledgment card will be sent in due course. Therefore, the appellant could not have presumed that claim No. 'C' had not been sent to UNCC or had been misplaced by the respondents. when he received the acknowledgement card in March, 1995. In any case, by the said date time for submitting and forwarding the claim forms upto 1st January, 1995 had expired. The contention of Union of India therefore loses all its force. Case of contributory negligence is not made out by the Union of India.

25. The facts stated in the writ petition and in the counter affidavit show that when the appellant did not receive acknowledgement card for claim form 'C', he made representations to the High Commission of India in London as well as Ministry of External Affairs, Delhi. It is the case of the appellant that as claim form 'C' was not traceable, he submitted a fresh claim form 'C; as he was advised, on 5th October, 1995. Even at this stage, the respondents did not properly take up the matter with UNCC accepting default and lapse on the part of the Union of India in forwarding claim form 'C' within the stipulated

time limit, i.e. by 1st January, 1995. Had this been done, probably UNCC would have agreed to belatedly accept claim form 'C' on the ground of bureaucratic delay and not punish the appellant. The belated claim form 'C' filed on 5th October, 1995, was ultimately rejected by UNCC as being beyond time. The above facts show that the appellant was not guilty of contributory negligence and was not responsible for the failure of the respondents-Union of India to send the claim form 'C' by 1st January, 1995. It may also be relevant to state here that from 1996 till 2001, the respondent-Union of India has written letters dated 10th May, 1996 and 5th May, 1999 in which it was stated that the claim of the appellant under claim 'C' was pending consideration before the UNCC. The respondent by letter dated 10th January, 2000 informed the appellant that his claim form 'C' had not been approved by UNCC, but in a subsequent correspondence dated 18th January, 2000, the aforesaid statement was negated and it was affirmed that UNCC was still examining the claim of the appellant. Thus, UNCC had rejected and not taken on record claim form 'C' as it was submitted belatedly after 1st January, 1995.

26. In view of the above facts, we feel that the Secretary, Ministry of External Affairs, should examine the claim form 'C' submitted by the appellant for KD 23,495 and pass a speaking order, examining and deciding the claim. For examining the said claim, the appellant will produce relevant material documents to substantiate and show the loss of properties, personal items,

income, etc. caused to him. On being satisfied, the respondents shall determine the quantum payable and make payment of the claim along with interest @ 9% per annum w.e.f. 1st January, 2001 till payment. In case the appellant is not satisifed with the quantum awarded and the decision, he shall be at liberty to file a civil suit to substantitate and prove his claim. Appellant will send by post all relevant papers including duplicate copy of claim form 'C' within one month from today to the Secretary, Ministry of External Affairs. The Secretary, Ministry of External Affairs or an officer appointed by him will decide and pass an order after hearing the appellant or his representative within three months thereafter.

27. With the above observations and directions, the present Appeal is allowed. In the facts and circumstances of the case, there will be no order as to costs.

(SANJIV KHANNA)
JUDGE

(DR. MUKUNDAKAM SHARMA)
CHIEF JUSTICE

OCTOBER 1, 2007.
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